In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-352

WALTER COLLINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a) and of the district court (Pet. App. 3a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1972. The petition for a writ of certio-

rari was filed on August 30, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a local selective service board must advise a registrant who indicates a desire to make a post-induction-notice conscientious objector claim that he can obtain in-service review of such a claim after induction.

2. Whether the court of appeals erred in not reviewing petitioner's sentence, which was concededly within lawful limits.

STATEMENT

This is a collateral proceeding under 28 U.S.C. 2255 in which petitioner challenges his conviction and sentence for various Selective Service law violations. After his 1969 jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of five counts of refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and he was fined $2,000. The court of appeals affirmed *per curiam*. 426 F. 2d 765. Certiorari was denied. 400 U.S. 919.

In the present action, petitioner seeks to have his sentence vacated under 28 U.S.C. 2255, on the grounds (1) that the conviction was invalid because he had not been advised by his local board of his

right to present his late-crystallizing claim of conscientious objection to the military authorities after induction and (2) that the sentence did not reflect individualized consideration. The district court denied the motion to vacate, holding that the local boards have no affirmative duty to inform registrants of their right to in-service review of post-notice conscientious objector claims and that a sentence within the statutory maximum is not subject to collateral attack under 28 U.S.C. 2255 (Pet. App. 3a-7a). The court of appeals affirmed *per curiam* (Pet. App. 1a).

The facts are not in dispute. Petitioner registered with his local board on December 11, 1962, and was thereafter classified II-S as a student until January 1967, when, having completed his college studies, he was classified I-A. In June 1967, petitioner passed the pre-induction physical.

Petitioner was thereafter ordered to report for induction on six occasions, three times in 1967 (September, October and December) and three times in 1968 (January, February and March). On each occasion, he either failed to report or failed to submit to induction. On December 12, 1967, the day when his third order to report for induction was issued, petitioner first indicated that he might be a conscientious objector by requesting and obtaining from the local board the special form for conscientious objectors. However, he was advised that the local board could not consider a post-notice conscientious objector claim, and he never returned the completed form to the local board. Following his failure to report for

induction in March 1968, petitioner was indicted on six counts of failure to report for and submit to induction, and he was convicted on five of those counts.[1]

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the absence of advice from his local board that he could obtain in-service review of a post-notice conscientious objector claim constitutes a denial of due process which invalidates his convictions. This contention was properly rejected by the courts below and warrants no further review.

No decision of this Court imposed an affirmative responsibility on the local board to inform petitioner of the opportunity for in-service review. The absence of such advice to petitioner should not invalidate the induction orders which had previously issued nor should it render the subsequent orders unenforceable. Upon receipt of those orders petitioner had a duty to report for and submit to induction. 32 C.F.R. 1632.14. His failure to satisfy that duty should not be excused simply because he was not expressly informed of a post-induction right that would have been accorded by military authorities.

In *Ehlert* v. *United States*, 402 U.S. 99, this Court held that the requirements of due process are satisfied by the provision of in-service review of post-

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[1] Petitioner explained that he did not receive the order for September 1967 until after the scheduled reporting date, and he was acquitted on the count charging him with failure to report for induction in that month.

notice conscientious objector claims and that such claims therefore need not be reviewed by the local boards. In doing so the Court made no mention of an additional local board responsibility for informing registrants about in-service review, and approval of the current local board practice of declining to review post-notice claims was not conditioned on the giving of such notice. Petitioner now argues that there still exists a "no man's land" where registrants who, uninformed of their in-service rights, have refused induction and thus may not secure any review of their claims. But this argument overlooks the facts that under *Ehlert* the local board was correct in informing petitioner that it would not consider a post-notice claim and that petitioner's claim went unreviewed solely due to his own failure to submit to induction.

Moreover, petitioner does not claim that he was unaware of the opportunity for in-service review or that he was prejudiced by the local board's failure to inform him of that right. Petitioner was represented by counsel during December 1967, when he first indicated to his local board an interest in being classified as a conscientious objector (SSF 80-82),[2] and his decision not to submit to induction was therefore presumably a well-informed one. Furthermore, by that date petitioner had already twice failed to report for and submit to induction, and the local

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[2] "SSF" refers to petitioner's Selective Service file which is part of the record lodged with the Clerk of this Court.

board's failure in December 1967 to inform him concerning post-induction rights could not affect the validity of his conviction for failure to report for induction in October 1967.[3] See, *e.g.*, *Noonan* v. *United States*, 434 F. 2d 582 (C.A. 3), certiorari denied, 401 U.S. 981.

2. Petitioner also contends (Pet. 7-9) that the court of appeals erroneously refused to review his sentence. The court, however, expressly considered, and rejected, his claim "that his sentence, which was far less than the maximum statutory imposable sentence, was arbitrary and improper" (Pet. App. 1a, n. 1).[4] In doing so, the court cited its earlier decision in *United States* v. *Saunders*, 435 F. 2d 683, where the applicable rule in such cases had been correctly stated to be that where no abuse of discretion is shown, a sentence within the statutory limits will be upheld. This is also the rule applied by the Court of Appeals for the Sixth Circuit in the cases cited by petitioner (Pet. 9), and there is thus no conflict on this issue.

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[3] Concurrent sentences were imposed for each failure to submit to induction.

[4] Under the statute, petitioner could have been sentenced to a maximum of twenty-five years' imprisonment and fined $50,000. He was in fact sentenced to five years' imprisonment and fined $2,000 (Pet. App. 7a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

A. WILLIAM OLSON,
Assistant Attorney General.

ROBERT L. KEUCH,
THADDEUS B. HODGDON,
Attorneys.

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